IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Crim. No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	

DEFENDANT'S RESPONSE TO GOVERNMENT'S MOTION
AND SUPPLEMENTAL MOTION REGARDING MENTAL HEALTH EVIDENCE

In its Motion and Incorporated Memorandum Regarding Mental Health Evidence (filed April 8, 2002, dkt. no. 93) (the "Motion"), the Government sought an order

> (1) requiring the defendant . . . to file a notice of intent by a date certain set by the Court specifying: a) the mental health experts who will testify or whose opinions will be relied upon and their qualifications, b) a summary of the diagnosis or diagnoses of said mental health experts and a summary of the basis for their opinions; (2) requiring the defendant, if he gives notice of intent to raise a mental health defense, to submit to an examination by an expert or experts of the Government's choosing; and (3) requiring the exchange between defense and Government experts of all materials upon which they may rely to form the basis of the opinions, including all medical records and other records.

Motion at 2.

In its Supplemental Motion and Incorporated Memorandum Regarding Mental Health Evidence (filed July 6, 2004, dkt. no. 1176) (the "Supp. Motion"), the Government brought to the Court's attention the related provisions of Rule 12.2 of the Federal Rules of Criminal Procedure, which were passed subsequent to the filing of the Motion, and reasserted its right to the relief it had requested originally. In addition, the Government noted that, in its opinion, the Government would be entitled to a reciprocal

examination even if the defendant did not submit to an examination conducted by a defense expert. Supp. Mot. at 4.

The defendant objected to the latter motion on the grounds that it was premature and the Court deferred further consideration, although it denied the Government's request that its mental health experts not be allowed to examine the defendant in the interim.

FACTUAL BACKGROUND

The instant case stands in sharp contrast to most, if not all, federal capital prosecutions when it comes to mental health evaluations.[1] In 2002, a psychiatric examination of the defendant was conducted by Dr. Raymond Patterson in connection with the defendant's efforts to proceed *pro se.* Dr. Patterson conducted that examination on behalf of the Court, but his name was submitted by the Government. Dr. Patterson made several unsuccessful efforts to examine the defendant, but ultimately was able to meet with him. In addition, Dr. Patterson received the benefit of meetings with both counsel for the Government and defense counsel, which resulted in the disclosure of substantial information by the defense, including information about the defendant's background which the defense had been able to gather. As a result, Dr. Patterson filed a report with the Court in which he offered, *inter alia*, a clinical

[1] The Government claims that "defense counsel has repeatedly indicated that much of their mitigation case rests upon the statutory mitigating factors set forth in 18 U.S.C. § 3592(a)(1) (impaired capacity) and (a)(6) (Disturbance)." Supp. Mot. at 1-2. This is strictly Government spin. Our citing these factors as being at issue hardly constitutes a declaration that "much of [our] mitigation case rests upon [them]."

diagnosis of the defendant. He ruled out an Axis I mental illness and found an Axis II Personality Disorder NOS.

While the defense contested Dr. Patterson's conclusions, the Government has been adamant in its defense of his work product and the soundness of his conclusions, see Govt's Position on Competency and Defendant's Self-Representation (filed June 7, 2002, dkt. no. 163) at 9-10, and it has belittled the contrary opinions of the "hired" defense experts. See *id*. at 10-11. Similarly, the Court has repeatedly rejected the defense criticism of Dr. Patterson's efforts. Thus, the starting point for evaluating what, if any, reciprocity might be due the Government if the defense introduces mental health evidence is the fact that a psychiatrist *recommended by the Government* has had the opportunity to conduct a clinical interview with the defendant, which the psychiatrist, the Government, and the Court considered sufficient for diagnostic purposes. Moreover, the Government has received what it rarely, if ever, does in such cases, and which it certainly is not entitled to under Rule 12.2, F.R.Cr.P., or decisional law -- the sharing of information by defense counsel based on their interactions with the defendant and their own investigation.

The defense, on the other hand, has had a more limited opportunity to have an expert of its choosing conduct an interview of the defendant. At the time of the initial competency motion, Mr. Moussaoui refused to meet with the defense expert. Since then, the only access a defense mental health expert has had to the defendant is observing him in court hearings, which clearly was equally available to the Government, and Dr. Amador's observations of and interaction with the defendant in

the holding cell preceding the deposition on June 10, 2004. Thus, the Government has actually had at least as much of an opportunity to have the defendant examined as the defense has. And, as the Government surely realizes, there is no prospect that the defendant will submit to any mental health evaluations in the future.

It is of little, if any, significance that Dr. Patterson was not chosen by the Government for the specific purpose of testifying at the penalty phase of the case. He obviously satisfies the Government's need for a forensic mental health professional and the Government could not be more enamored with his work product. Moreover, Dr. Patterson has the apparent advantage of having met with Mr. Moussaoui closer in time to the commission of the offense than any other expert it could select now. Of course, the Government need not limit itself to Dr. Patterson, since plainly any expert the Government might now choose would have the benefit of his report and, presumably, the opportunity to discuss his evaluation with him. But there is no reason to believe that Dr. Patterson would not be available to assist the Government if it decided to avail itself of his services.

Dr. Patterson's evaluation of the defendant is not the only advantage the Government has in this case which it does not normally have. First, it has the benefit of Mr. Moussaoui's voluminous writings. See Govt's Position on Competency and Defendant's Self-Representation (filed June 7, 2002, dkt. no. 163) at 8 (citing Mr. Moussaoui's writings as rational and logical, and as evidence of his not suffering from any mental disease or defect). Second, it has had the extensive opportunity to observe his behavior in open Court, and in closed proceedings, *id*. at 7-8 something

that simply does not happen in cases in which the defendant is represented by counsel and, therefore, largely sits quietly at counsel table. And third, it has already received, nearly a year -- and in some cases, several years -- prior to trial, the various evaluations of Drs. Amador and Stejskal, and Dr. Grassian. Indeed, Dr. Amador's latest report contained an extraordinarily detailed description of his observation of the defendant during the deposition noted above. Thus, even though the Government chose not to have a mental health professional present for that, or other, proceedings, it certainly may not complain that it did not have the opportunity to do so.

ARGUMENT

The Government's fundamental problem is its insistence on a cookie-cutter approach to mental health procedural issues. But to impose on the defense in this case procedures designed for the normal case, in which the Government has had no access to the defendant, simply because that is the way it has been done in other cases, would be unjustified and would do violence to both common sense and the defendant's Constitutional rights.[2]

I. The Government's Demand for a Reciprocal Examination

The Government insists that its "discovery rights -- including its right to examine the defendant -- exist regardless of whether the defendant submits to an examination

[2] The Government notes its need to perform psychological testing, but does not demonstrate why that would be appropriate. The defense has no intention of conducting such testing; and the defendant plainly would not cooperate with such an effort. Surely, the Government realizes that. In the absence of testing by the defendant, the Government has no need to rebut evidence derived from such testing and no claim to reciprocity.

conducted by a defense expert." Supp. Mot. at 4. It specifically notes that, even if Dr. Amador testifies based upon his observations of the defendant, the Government must be allowed to proceed with its examination. The authority cited by the Government simply does not address the proposition it advances.

In *United States v. Hall*, 152 F.3d 381 (5th Cir. 1998), the defendant provided notice of his intent to introduce psychiatric testimony, but then refused to submit to a Government examination, which caused the Court to bar the defense expert testimony. *Id.* at 398. Thus, the Court had no cause to, and did not, address the specific proposition advanced by the Government -- that, even if the defendant does not submit to a defense examination, he may not present mental health testimony unless he submits to a Government examination. And in *United States v. Minerd*, 197 F.Supp.2d 272, 274-76 (W.D. Pa. 2002), the Court addressed only the generic question of whether the defendant's constitutional rights would be violated by an Order allowing a Government examination once the defendant announced his intention to introduce mental health evidence. The Court did not address the question of the Government's "rights" where the defendant refuses an examination by a defense expert, but nevertheless intends to introduce mental health evidence.

Likewise, in *United States v. Thomas*, 320 F.Supp.2d 790 (N.D. Ind 2004), the Court simply rejected a constitutional challenge to Rule 12.2, finding that the defendant's rights were not infringed by an order "directing him to submit to a mental health exam conducted by the Government's mental health expert since he intends to introduce mental health evidence during the penalty phase." *Id.* at 793. That is a far

cry from a holding that the *Government* has the "right" to an examination even if the defendant is not examined by a defense expert -- the proposition for which *Thomas* is cited by the Government.[3] And, while the Court in *United States v. Beckford*, 962 F. Supp. 748 (E.D. Va. 1997) recognized that the Government had a "rebuttal right" which would be satisfied by a reciprocal examination, it also recognized that this right had to be balanced against the constitutional rights of the defendant. See *id.* at 763. The Court did not hold that, under all circumstances, the Government would be entitled to such an examination or that the failure to allow such an examination, even where there had been no defense examination, would always result in the prohibition of the defense mental health evidence. Moreover, the permissive language in Rule 12.2(c)(1)(B),[4] -- added since *Beckford* -- recognizes that the applicable analysis is not as simplistic as the Government would make it.

While the Government asserts that "fundamental fairness" animates its "right" to reciprocal discovery, Supp. Mot. at 3, it fails to explain why that principle entitles it to the benefit of a mental health examination in this case, when it has already had the benefit of:

(1) an examination and reports by Dr. Patterson, a psychiatrist it proposed;

(2) a favorable diagnosis by Dr. Patterson;

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[3] Indeed, the *Thomas* Court noted that "a requirement that a defendant "undergo a psychiatric examination may in some circumstances infringe on a defendant's rights under the Fifth and Sixth Amendments, ..." 320 F. Supp.2d at 793.

[4] ". . . [T]he court may . . . order the defendant to be examined under procedures ordered by the court."

(3) Dr. Patterson's interview of defense counsel;

(4) the defendant's extensive writings;

(5) extensive opportunities to observe, and to have mental health professionals observe, the defendant's conduct in court;

(6) observations and transcripts of the defendant's numerous and sometimes lengthy in-court discourses;

(7) the opportunity to obtain reports as to the defendant's behavior in a constantly observed isolation cell for nearly *three-and-one-half years,* Govt's Position on Competency and Defendant's Self-Representation at 10; and

(8) the declarations and reports of Drs. Amador, Stejskal and Grassian.

The fact is that the Government has had available to it a veritable treasure trove of mental health information and reports, including a clinical interview by a Government selected expert, which, at least until now, the Government has thought was perfectly adequate for assessing the defendant's mental health. See *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam) (basing Due Process violation on State's own reliance on defendant's excluded evidence in co-defendant's capital case). In the normal capital case, the Government would never have access to such information.

The rationale of the cases cited by the Government -- that the defendant should not be allowed to "'offer expert testimony based upon his own statements to a psychiatrist and then deny the government the opportunity to do so as well in rebuttal,'" Motion at 3 (quoting *United States v. Webster*, 162 F.3d 308, 398 (5th Cir. 1998)) -- simply does not apply where, as here, the Government has had *at least an equal, if not a greater, opportunity*, to obtain statements from the defendant than defense counsel

have had. None of the cases cited by the Government remotely suggest that, under circumstances such as these, the Government is entitled to still more. Indeed, this is precisely the kind of case in which the Court *should not* exercise its discretion in favor of such a request by the Government. If, as the Government claims, the underlying principle is "fundamental fairness," that principle counsels against the Government's demand for a "reciprocal" examination.[5]

The Government's legitimate need to obtain rebuttal evidence has been satisfied by what it has received already. Conditioning the defendant's right to present mental health evidence on yet another examination by a Government selected expert would allow the Government's non-constitutional "rebuttal right" to overwhelm the defendant's right under the Fifth and Eighth Amendments to present mitigating evidence. The Advisory Committee Notes to the 2002 Amendments to Rule 12.2 recognize that numerous factors may counsel against conditioning the defendant's presentation of mental health evidence on his submission to a government examination, including, *inter alia*, "the impact of preclusion on the evidence at trial and the outcome of the case and the extent of prosecutorial surprise or prejudice . . . ." (citing *Taylor v. Illinois*, 484 U.S.

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[5] To understand the inherent illogic in the Government's position, one need only consider the following scenario: medical records establish a defendant's lengthy history of serious mental illness, but, because of that illness, the defendant refuses to be examined by any mental health professional. Under the Government's theory, the defendant could not present his documented history of mental illness, because the Government was denied its "right" to an examination, and the jury would have to decide whether he should be sentenced to death without any knowledge of that well-documented mental illness.

400, 414 n.19 (1988) (citing *Fendler v. Goldsmith*, 728 F.2d 1181 (9th Cir. 1983))).[6] And, indeed, in *Taylor*, the Supreme Court noted that "a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor." 484 U.S. at 414. That, of course, is all the more true when it is the defendant's constitutional right to present mitigating evidence is at stake. See *Green*, 442 U.S. at 97 (1979) (finding violation of Due Process right to present mitigating evidence where State had itself found defendant's excluded evidence sufficiently reliable to use it in co-defendant's capital case) (citing *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (plurality opinion),[7] *id*. at 613-18 (opinion of Blackmun, J.) and *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

While one could attribute the Government's demand for yet further advantage to simple greed -- piling up favorable mental health evaluations -- but its actual agenda is likely something else again. Even before the defense declaration in this Response that it would not conduct any testing, the Government knew full well that the defendant would not submit to testing or any psychological interview for that matter. Indeed, the Government has reminded the Court and, presumptuously, defense counsel, of the defendant's instructions that no "mitigation" be presented. Consistent with that position, the Government, while arguing for the existence of its discovery rights "regardless of whether the defendant submits to an examination conducted by a

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[6] While this discussion is in the context of sanctions under subsection (d), it is no less applicable where, as here, the issue is so clearly joined at the time the Government seeks an Order under subsection (c).

[7] Decided on Eighth and Fourteenth Amendment grounds.

defense expert," Supp. Mot. at 4 (emphasis added), declares: "Simply put, . . ., defendant's recalcitrance does not defeat the Government's discovery rights." *Id*. Thus, it is painfully apparent that its demand for another evaluation is not predicated on any actual need for such an examination, but, rather, on the sanction it will demand as soon as the defendant refuses such an examination -- the preclusion of the introduction of all mental health evidence by the defense. See Supp. Mot. at 2 (noting that failure to comply with an order under Rule 12.2, F.R.Cr.P., may result in exclusion of defense mental health expert evidence at sentencing). Having manipulated the plea process, with an effectively *pro se* defendant, to obtain a Statement of Facts which went far beyond that which was necessary to support the plea itself, and was plainly intended to advance the ball well towards death eligibility, the Government now wants to truly reduce the capital sentencing process to shooting fish in a barrel.

II. The Government's Other Requests

Beyond its demand for a notice of intent to introduce expert mental health testimony[8] and a reciprocal examination, the Government seeks an Order requiring (1) disclosure of the defense expert(s), (2) a summary of diagnoses and basis for opinions, and (3) the exchange of all materials upon which the defense and Government experts may rely to form the basis of their opinions. Supp. Mot. at 4-5.

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[8] The defendant does not object to a requirement that he be required to provide such a notice. However, the timing requested by the Government is unreasonable and unnecessary. Since the defense will not conduct "testing," there is no need to allow time for that process, and it must be noted that it is only neuropsychological testing which creates time constraints and, even then, nothing resembling the advanced notice the Government seeks here. See *Beckford*, 962 F. Supp. at 765-66.

The defendant has no objection to the first two of these requests, so long as the Government is required to reciprocate, but strongly objects to the third. Tellingly, the Government has provided no authority in support of its request to discover such materials. Rule 12.2 does not provide for it, and Judge Payne, in *Beckford*, a decision the Government commends as "well-reasoned," Motion at 3, and upon which it relies extensively, emphatically rejected just such a request by the Government on the grounds that it would violate the defendant's Sixth Amendment rights. See 962 F. Supp. at 764 n.16.

CONCLUSION

Given the unusual circumstances of this case, it would not be appropriate, nor is it necessary, to require the defendant to submit to a Government examination as a condition for his introducing mental health evidence. The defendant has no objection, however, to the Court implementing the remainder of the procedures set forth in *Beckford*, including the filing of a notice of intent by the defense and the reciprocal filings by the Government.[9] While there will be no guilt phase, the reaffirmation of the defendant's intent to introduce such testimony should be tied to the finding of death eligibility.[10]

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[9] The defendant proposes December 15, 2005, as the date for filing a notice of intent, which will allow the Government a month and a half before even the beginning of the presentation of the Government's case-in-chief. Given the amount of mental health information the Government has already received from the defense, that is more than adequate notice.

[10] Neither the parties nor the Court have addressed the question of whether the trial should be bifurcated, the first phase addressing death eligibility and, if the

(continued...)

Respectfully submitted,

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[10] (...continued)
defendant is found eligible, the second phase determining punishment. Since the death eligibility criteria are the "functional equivalent" of offense elements, see *United States v. Higgs*, 353 F.3d 281, 298 (4th Cir. 2003), they should not be determined in the same proceeding where, for example, victim impact evidence is introduced. If bifurcation is ordered, the procedures which were pegged to the guilty verdict in *Beckford* could be pegged instead to the finding of death eligibility. It may be best, however, if such details were resolved in a conference among the Court and the parties.

CERTIFICATE OF SERVICE[11]

I hereby certify that on this 13th day of June, 2005, a true copy of the foregoing pleading was served upon AUSA Robert A. Spencer, AUSA David J. Novak and AUSA David Raskin, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, VA 22314, by placing a copy by hand in the box designated for the United States Attorney's Office in the Clerk's Office of the U.S. District Court for the Eastern District of Virginia and by facsimile upon same to 703-299-3982 (AUSA Spencer), 804-771-2316 (AUSA Novak) and 212-637-0099 (AUSA Raskin).

/S/
Kenneth P. Troccoli

[11] Pursuant to the Court's Order of October 3,2002 (dkt. no. 594), the instant pleading was presented to the CSO for a classification review before filing. That review determined that the pleading is not classified. A copy of this pleading was not provided to Mr. Moussaoui until after completion of the classification review.